U.S. Department of Labor

Office of Administrative Law Judges
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Mailed: 7/6/2000

IN THE MATTER OF:	*	
	*	
Luis F. Chupina	*	
Claimant	*	
	*	
Against	*	Case No.: 1999-LHC-1655
	*	
Broward Marine, Inc.	*	OWCP No.: 6-166828
Employer	*	
	*	
and	*	
	*	
Zenith Marine Insurance Co.	*	
Carrier	*	

APPEARANCES:

Barry R. Lerner, Esq.
For the Claimant

Ben H. Cristal, Esq.
Warren K. Sponsler, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on October 6, 1999 in Fort Lauderdale, Florida, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, and RX for an exhibit offered by the Employer/Carrier("Respondents"). This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 9	Attorney Lerner's letter relating to the deposition of Dr. Ira Fox	11/12/99
CX 10	Attorney Lerner's letter filing the	11/18/99
CX 11	November 2, 1999 Deposition Testimony of Dr. Fox	11/18/99
RX 6	Attorney Sponsler's November 18, 1999 letter to Dr. Guillermo Pasarin, as well as	11/28/99
RX 6A	Dr. Pasarin's November 23, 1999 supplemental report[1]	11/28/99
CX 12	Attorney Lerner's letter filing the	12/08/99
CX 13	November 16, 1999 Deposition Testimony of Matthew C. Deutscher, M.D.	12/08/99
CX 14	November 16, 1999 Deposition Testimony of Richard S. Kleiman, M.D.	12/08/99
RX 7	Attorney Sponsler's December 8, 1999 letter about Dr. Pasarin's report	12/13/99
CX 15	Attorney Lerner's response relating to	12/20/99
RX 7	Attorney Sponsler's reply	01/10/00
RX 8	Attorney Sponsler's letter filing the	01/10/00

[1] Claimant's objections to that report of Dr. Pasarin are overruled as the report is relevant and material herein and is not unduly cumulative, the standard of admissibility in these proceedings. The objections really go to the weight to be accorded to that opinion and the report is admitted **de bene esse**.

RX 9	Medical Records of Dr. Pasarin relating to treatment of the Claimant from September 1, 1995 through May 8, 1998	01/10/00
RX 10	Attorney Sponsler's Notice of Appearance as Claimant's counsel of record	01/24/00

The record was closed on January 24, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On July 20, 1995 Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed timely notices of controversion on March 26, 1996 and October 31, 1997.

6. The parties attended an informal conference on May 8, 1997.

7. The applicable average weekly wage is $ 414.05. (RX 3)

8. The Employer and Carrier ("Respondents" herein) voluntarily and without an award have paid temporary total compensation for certain periods of time as reflected on the forms filed by the Carrier with the OWCP (CX 5).

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. Entitlement to future medical care and treatment, as well as payment of any unpaid medical bills relating to Claimant's July 20, 1995 injury.

4. Interest and so-called penalties on any unpaid compensation benefits, as well as an attorney's fee for Claimant's counsel and reimbursement of the litigation expenses.

Summary of the Evidence

Luis F. Chupina ("Claimant"), fifty-one (51) years of age, with a high school education and vocational school training as a welder, and an employment history primarily as a welder or welding instructor began working on April 27, 1994 at the Fort Lauderdale, Florida shipyard of Broward Marine, Inc. ("Employer"), a maritime facility adjacent to the navigable waters of Port Everglades and the Atlantic Ocean where the Employer, **inter alia**, repairs vessels. On July 20, 1995 Claimant's supervisor was a man named "Pete" and Claimant was welding and, in the process of attempting to smooth "a little lump in a weld," he then proceeded to grab the grinder and "pulled the trigger but the (grinder) came out of my hand, hit (him) on (his) left knee. (He) thought it was a little cut, because (he) had a little cut in (his) pants. But when the guy (his co-worker) who used to be a navy seal" asked Claimant what happened, he went to his co-worker "and he grab[bed] a knife and cut the pants, and (he) had a big opening" or cut in his knee. (TR 20-33; RX 4).

Claimant then climbed out of the boat in which he was working "because nobody was able to carry (him) down," Claimant testifying that he was "five, seven" and weighed 208 pounds as of his September 10, 1999 deposition. Paramedics were called and Claimant was taken to Broward General Hospital where he remained in the Emergency Room from 3 pm to almost midnight. X-rays were taken and as the grinder had severed his left leg nerves and tendons, a specialist had to be called in to perform that surgery. (TR 33)

Claimant then went home and returned to the hospital thereafter for physical therapy to regain his loss of strength in the left leg. He was referred to another doctor for more therapy and, after an MRI revealed some "debris left inside" the leg, he underwent additional surgery to remove the debris, surgery performed by Dr. Raul Aparicio. The doctor prescribed additional physical therapy but this bicycle therapy actually aggravated his left leg symptoms and caused a shortness of breath and chest pain. Claimant protested when Dr. Aparicio told him that there was nothing else he could do for Claimant because he was still experiencing daily leg pain. (TR 33-35; RX 1, RX 4).

The record reflects that Claimant continued to work at reduced pay from July 23, 1995 through October 19, 1995, at which time he stopped to undergo the left knee surgery. As directed he returned to work on February 18, 1996, again at reduced pay, on light duty

in the stockroom, although he "couldn't even walk," and he made an appointment to see his doctor. However, the doctor could not see him for a week and the doctor injected the knee with cortisone but this provided relief for a "couple or few days," Claimant remarking, "and I never got better." Claimant then went to see Dr. Richard S. Kleiman, an orthopaedic surgeon, on referral from his attorney, and the doctor advised Claimant that he would probably have that left leg pain the rest of his life and that he would have to learn how to live with that pain Physical therapy was also prescribed. (TR 35-39; RX 4)

Claimant's injury resulted initially in loss of strength and weakness of his left leg and caused him to fall and stumble frequently, especially down the stairs at his two story apartment. Moreover, his altered gait of placing more weight on his right leg has also resulted in weakness in that leg and in his low back, and he wears bilateral knee braces to give him stability and allow him to ambulate. Dr. Kleiman no longer treats all of Claimant's orthopedic problems and Dr. Claire Katz, his family physician, treats his insulin-dependent diabetes and his hypertension. Claimant has also been to see Dr. Ira Fox and Dr. Matthew C. Deutscher, and their reports will be discussed below. Claimant has also been referred to a pain management clinic and to a psychologist for counseling as to how to live with and function with his chronic pain symptoms. This additional treatment has not provided the anticipated relief and he experiences daily pain in both legs and in his low back, Claimant remarking that his recovery has been significantly displayed because the Employer would not, as of his deposition, approve the MRI recommended by Dr. Fox and the treatment plan prescribed by Dr. Deutscher. Dr. Fox has recommended additional surgery for Claimant and the MRI is needed to confirm and/or rule out that surgery. He had to cancel an examination with Dr. Fox in August of 1999 because the Employer and Carrier would not approve it. The MRI was finally approved by the Carrier on September 28, 1999, as well as a neurological exam by Dr. Pasarin. (CX 2).

Claimant had been unable to see these specialists before his hearing because of the Respondents' inaction and he sees Dr. Katz every three months for routine followup of his hypertension and diabetes. He also saw Dr. Gonzalez this past year for back surgery after an infection resulted from some sort of "spider bite." Claimant did see Dr. Pasarin for a brief five minute examination upon referral from Dr. Fox and Dr. Deutscher, who are associates at Health South/ Sunrise Rehabilitation Hospital. Dr. Pasarin did not tell Claimant the results of that examination. Claimant underwent a functional capacity evaluation (FCE) in January of 1999, on referral from Dr. Deutscher and after he has completed a course of physical therapy. He was also sent to Easter Seals for evaluation of his residual work capacity. Claimant's doctors have not released him to return to work and his doctors insist that other testing must be done to determine if he is at maximum medical

improvement. Claimant has used a cane to ambulate and this altered gait of "using the cane (and) by pressing it too hard down," has caused, "a lot of elbow and shoulder pain," for which symptoms Dr. Kleiman prescribed physical therapy. Dr. Molly Snell is the psychologist he has seen and he has seen a total of "two psychiatrists already." He has seen no other doctors. He has looked for work since his layoff on January 7, 1999 (RX 4) at a number of companies but no one will hire him for various reasons. He currently receives $199.00 every two weeks as his workers' compensation benefits; his wife has to work two jobs to supplement family income. He applied for Social Security Administration disability but his application was rejected in early 1998. He has not reapplied. (TR 35-39, 41-45; RX 4) He applied for and has received unemployment benefits for six months. (TR 35)

Claimant experiences chronic bilateral leg pain, low back, shoulder and elbow pain. He has difficulty sleeping and sleeps at most 3-4 hours each night as the pain symptoms constantly awaken him. He has to then get up, move around and he will spend the rest of the evening in a recliner. He has been prescribed sleeping pills but they do not provide the anticipated relief. He takes insulin injections twice daily; his low back pain radiates down both legs to his feet and he "needs to have some special shoes" because his feet hurt all the time. He has also been experiencing "a lot of headaches" and believes they may be a side effect of his insomnia. He takes aspirin for these headaches. Prolonged sitting, standing or walking aggravates his multiple orthopedic problems and, as a result, he leads a mostly sedentary life as any physical exertion aggravates these symptoms. He tries to help his wife by preparing dinner but he "can't even stand up where you wash the dishes because (his) back hurts just by standing right there;" he experiences low back pain twenty four (24) hours each day, rates such pain as a "10" on a scale of 0 to 10, with 10 being the most pain. On his infrequent good days he rates his back pain as a "7" or "8". He obtains relief by laying down and staying off his feet. He experiences constant bilateral leg pain and his "left leg hurts most." He rates his leg pain as "six, seven, sometimes eight." His right elbow and right shoulder pain continue daily and his elbow pain is rated as "a really good eight". The shoulder pain is exacerbated by reaching above his shoulder. He used to wash his automobile frequently but since his injury on July 20, 1995 he has been able to do that chore perhaps ten times. He cannot even bend over to put on socks or to tie his shoes and he has difficulty performing his personal hygiene. He cannot walk without his bilateral knee braces and cane because of the weakness in both legs. He can only walk about one city block and he then he has to stop, sit down and rest on a "little stool" he carries with him. He can sit or stand for about thirty (30) minutes and he then has to alternate positions to alleviate the pain. (TR 40-47; RX 4).

Claimant wants to return to work and he has worked with Kathleen Sellers at the Florida Department of Labor and with people

at Easter Seals in 1999 in an effort to retrain himself. These efforts have not borne fruit as the rehab file was closed once the doctors suggested that Claimant may require additional surgery. He signed a waiver to that effect with Ms. Sellers. He would like to have the MRI and additional testing performed so that the doctors can determine what else has to be done for him. At the time of his January 7, 1999 layoff, Claimant was working in the stock room "just supplying the workers with sand paper and glues and "nails" and other such supplies. He also was in charge of receiving incoming merchandise. He was able to do this work because he did not have to left anything; others did the lifting and a forklift was used to lift heavier items. Claimant's pay was reduced to reflect the light duty work he was performing. He was paid his regular welding wages of $11.25 per hour when he first returned to work. However, after his second return to work, he was paid $6.50 per hour, a rate which was then increased every three or four months so that on January 7, 1999 he was earning $9.43 per hour. The $11.25 per hourly rate included .25 cents per hour as a night-time differential. He also wears back and knee braces, and these braces have been prescribed by Dr. Deutscher. (TR 38-41; RX4)

Sabrina Mitchell, who has been employed as an adjuster with the Carrier since September of 1998, has been working on Claimant's compensation claim since June of 1999. The parties deposed Ms. Mitchell on September 13, 1999 (CX 1) and she testified that the average weekly wage as determined by the Carrier is correct as it is based on his wages for the 52 weeks prior to the date of injury, that fringe benefits such as health and dental insurance are not included in that July 12, 1996 wage statement, that she did not know whether Claimant was receiving such benefits at that time, that she did not know whether such benefits should be included in the average weekly wage and that she did not know the value of any such benefits. (CX 1 at 3-16)

According to Ms. Mitchell, "Claimant was placed at maximum medical improvement by Doctor Kleiman (on) May 20, 1996", and the doctor "assigned a 7 percent rating to the left leg, 13 percent rating to the right arm." Dr. Kleiman is considered the Claimant's choice of physician and the Carrier has also authorized Dr. Kleiman's referral of Claimant to Dr. Ira Fox, a specialist. The Carrier has also authorized the referral to Dr. Matthew Deutscher, a physiatrist, but the Carrier has deferred to Dr. Kleiman on the date of maximum medical improvement. Ms. Mitchell, as of September 13, 1999, was not aware that Dr. Deutscher had prescribed, as of April 16, 1999, an MRI of the Lumbosacral spine, or that Dr. Fox had also prescribed that test, apparently because, as of that date, Kelly Gotch was the adjuster assigned to this claim. However, a copy of that prescription by Dr. Fox was faxed to Ms. Gotch on April 16, 1999 (CX 1, Depo. Exhibit 1). (CX 1 at 7-9)

Ms. Mitchell did talk to Naline at Dr. Fox's office on May 25, 1999 and discussed a prescription for Paxil, a prescription which

the Carrier approved after receiving from the doctor information about the "medical necessity" thereof, **i.e.,** an anti-psychopathic drug used as part of a pain management program. As of May 25, 1999, Ms. Mitchell did not know the nature of Claimant's work restrictions but she did have a copy of Dr. Deutscher's December 14, 1998 report wherein the doctor, **inter alia**, reports the existence of symptoms consistent with a diabetic neuropathy and referred Claimant to a neurologist for further evaluation. As of September 13, 1999, the Carrier had not approved that referral "because the diabetic neuropathy is not causally related to the Claimant's industrial injury" by the adjuster assigned at the time and the medical (nurse) case manager." (CX 1 at 9-13)

The Carrier has not authorized an internist to monitor Claimant's pre-existing hypertension and/or diabetic condition, although they may affect his orthopedic or psychological problems, again because those conditions are not causally related to Claimant's maritime injury and because there is no medical documentation that those conditions have been aggravated by his work-related injury. The Carrier is presently utilizing the July 15, 1999 vocational evaluation of Ms. Susan Kennis of the Easter Seal Centers, an evaluation not arranged by the Carrier. Thus, the Carrier is not responsible for any bill from that center and they should not be sent to the Claimant but to whomever is responsible therefor. The Carrier has authorized a Labor Market Survey and that was recently sent to Claimant's attorney. (CX 1 at 13-22)

Ms. Mitchell is not aware whether the reports of Dr. Fox and Dr. Deutscher were sent to Dr. Kleiman to determine if his opinion on maximum medical improvement was still valid and operative. (CX 1 at 20-31) Claimant was earning $377.20 per week at his January 7, 1999 layoff. (CX 1 at 34)

Dr. Richard S. Kleiman, an orthopedic surgeon who has been licensed in the State of Florida since April of 1982, was also deposed on November 15, 1999 (CX 14) and the doctor testified that he first saw Claimant in March of 1996 for evaluation of multiple pain symptoms resulting from his July 20, 1995 work injury, that Claimant was experiencing pain in his left knee, back, right elbow and shoulder at that time, that the doctor "recommended resumption of some physical therapy," started treating the inflammation of his elbow and prescribed "anti-inflammatory medication and physical therapy treatments for his elbow, shoulder and for his knee, told him to avoid squatting, kneeling and climbing activities because of weakness and pain, and limiting use of his right upper extremities, and was to continue using a lifting belt." As of June of 1996, Dr. Kleiman "felt the patient was at maximum medical improvement as regarding his knee, his shoulder and his elbow, and on that day (the doctor) gave him an impairment rating of the American Medical Association guidelines of approximately 14 percent impairment (of the) whole body," the doctor "apportion(ing) to the knee

approximately 7 percent and to the upper body approximately 8 percent at that time." (CX 14 at 3-6)

Dr. Kleiman did see Claimant "at times after that as well" as he "was having more complaints now of back pain as well as having the residual pain in his knee, which was giving him a lot of problems and stopping him from doing a lot of activities," the doctor remarking that Claimant's "shoulder and elbow were stable, and although they were permanent injuries they were relatively, at that point, acquiescent to one of the major," **i.e.**, "his knee as a continuation of his back" problem." Diagnostic tests revealed "a herniated disk, a small disk protrusion at L5, S1, and a smaller left-sided herniation at the T11 and T12 area, although (the doctor) felt that his pain was mostly from the problem in the lower back itself and the HNP herniated disc and lower back as well as a chronic pain inflammation in the soft tissue." Dr. Kleiman "treated Claimant conservatively, and he improved slightly but had continued complaints of pain inflammation. (Dr. Kleiman) recommended follow-up in a chronic pain program including anesthesia evaluation, a possible psychiatry evaluation for the management of the chronic myofascia pain in his back as well as the pain in his leg." (CX 14 at 6-7)

Dr. Kleiman opined that Claimant reached maximum medical improvement with reference to his back on August 28, 1997 "and gave him a 7 percent whole body impairment at that time from the herniated disc and the residual complaints there. He was then referred to see Dr. Ira Fox, who has been treating him ever since. Dr. Kleiman last saw Claimant in August of 1998 because "he was having a problem getting into a pain management program and (Claimant) asked if there was anything (the doctor) could do, and (the doctor) tried to assist him in any way that (he) could at that point," the doctor concluding, "I felt that at that point he would be best served in a chronic pain management program," "that that was the way to go," that "had also been the opinion of Dr. Fox" and that "orthopedically there was nothing further (he) could do for the patient." (CX 14 at 7-8)

Dr. Kleiman opined that Claimant was not a surgical candidate for his lumbar problems "because the herniated disc was small and his pain was more diffuse," that he had no objection to a referral to an "orthopedic spine specialist after having the treatments that he had under the care of the pain management program" because "anything which may help is worthwhile to be investigated," the doctor remarking that "at the very least to have a consultation (with a back specialist) is warranted." Dr. Kleiman further opined that referral to a pain management program is appropriate because "he was having chronic pain," because "the pain was legitimate" and "was affecting his activities" and because the other treatment modalities "had been only at most partially successful." According to the doctor, Claimant's "motivation was excellent" and a pain

management specialist, such as Dr. Deutscher, is "trained in the treatment of pain on a chronic basis;" whereas, an orthopedic surgeon, such as Dr. Kleiman, is "an acute pain specialist and acute care specialist." (CX 14 at 8-10)

Dr. Kleiman, Claimant's initial free-choice of physician, was never shown any of the reports of Dr. Fox or Dr. Deutscher and was never asked to comment on their opinions by the Carrier. Dr. Fox did send several of his reports directly to Dr. Kleiman as part of the normal protocol among physicians in South Florida. The Carrier did recently send to Dr. Kleiman a letter in which Ms. Claire Kattmann, the Carrier's case manager, "asked (the doctor) several questions regarding (his) overall treatment of Mr. Chupina." Dr. Kleiman answered the questions as follows: Claimant "suffers from a chronic back problem" and "is not a surgical candidate; that he agreed with Dr. Fox that "an evaluation by a spine surgeon was indicated" and at that time "might be a benefit;" that such referral to Dr. Chris Brown was appropriate for evaluation and "for a medical clearance for surgery including a discogram;" that "surgical evaluation is of benefit if the surgery can help to improve the pain," that "a discogram may also help to aid in the diagnosis and to see if surgery would help." (CX 14 at 10-13)

Dr. Christopher Brown does perform discograms and while Dr. Kleiman is Claimant's initial free choice of physician, a referral to Dr. Deutscher is "most appropriate" as of the time of the doctor's deposition and "if and when (claimant) becomes a surgical candidate and if and when Dr. Brown or another spine surgeon did the surgery, he (Dr. Brown) would then at that point ... assume the care as regarding his back. Dr. Kleiman, after reviewing his progress notes relating to his treatment of the Claimant, testified that he did not prescribe "a work hardening" program for Claimant and, in any event, such program would await until Claimant begins the pain management program and has the benefit of that program's team approach. Moreover, the Carrier has not provided Dr. Kleiman with any work hardening results. (CX 14 at 13-15)

According to the doctor, Claimant reached maximum medical improvement for his knee, shoulder and his elbow on June 19, 1996 and for his back on August 28, 1997, and his injury had resulted in a fourteen (14%) percent impairment of the whole person with reference to his lower extremity, upper extremities, his shoulder and elbow problems, as well as a seven (7%) percent impairment, as of August 28, 1997, for his lumbosacral spine problems based upon the positive findings of his MRI. As of May 22, 1996 Dr. Kleiman imposed permanent restrictions, because of Claimant's multiple disabilities, against lifting, pushing or pulling over thirty (30) pounds, against climbing, squatting or kneeling, against prolonged standing or excessive walking, and Claimant was directed to return to see the doctor "on an as-needed basis." (CX 14 at 15-17)

Dr. Kleiman would defer to Dr. Deutscher's opinion that any

further referral for an evaluation by a spine surgeon should be to Dr. Pasarin, especially as Dr. Pasarin did examine Claimant in April of 1998, three months after that recommendation Dr. Kleiman and Dr. Fox. Dr. Kleiman further testified that he has "a general idea" about the concepts of sedentary work, light duty, medium duty and heavy duty and that the restrictions he imposed on Claimant would limit him "(p)probably between light to medium work." (CX 14 at 17-20)

Dr. Kleiman has not been furnished a copy of the results of Claimant's January 19, 1999 functional capacity evaluation and the doctor is familiar with Health South as a facility to which he sends his patients for an FUNCTIONAL CAPACITY EVALUATION (FCE) and he "absolutely" does review the FCE to determine what a patient could or could not do from a physical standpoint. Claimant's permanent restrictions are based upon the doctor's "opinions at that time" and he admitted that those restrictions might be modified if the Carrier had provided a copy of the FCE and if the FCE demonstrated less than maximal effort by the Claimant. (CX 14 at 20-22)[2]

Dr. Ira Fox, who is Board-Certified in anesthesiology and pain management, testified that Claimant has been a patient of his upon referral from Dr. Kleiman on October 13, 1997, that the diagnosis was left L5-S1 radiculopathy, secondary to disc protrusion, as well as right lumbosacral facet joint arthropathy, that the patient should undergo epidural steroid injections under fluroscopic visualization for diagnostic and potential therapeutic benefit and that the injections were authorized by the Respondents. According to the doctor, these injections provided "some partial relief short term" and, as of January of 1998, Dr. Fox felt that the "patient may benefit from consultation with a surgeon," as well as participation in a pain management program. Dr. Matthew Deutscher was the physiatrist in charge of that program and in April Dr. Deutscher referred Claimant back to Dr. Fox, who again recommended "a spinal surgeon evaluation." Dr. Fox last saw Claimant on October 8, 1999, at which time the doctor continued Claimant's medications and reiterated his recommendation "for a spine surgery evaluation." (CX 11 at 3-7)

Dr. Fox contacted the Carrier's case manager and she agreed "to arrange the spine surgery consultation with Dr. Christopher Brown," an associate of Dr. Kleiman's. Dr. Fox had been led to believe that Claire Kattman had approved that evaluation. Claimant's chronic pain syndrome has affected his daily living and

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[2] Objections made by both counsel at the depositions of Dr. Fox, Dr. Deutscher and Dr. Kleiman as the testimony is relevant and material to the unresolved issues herein and as the objections really go to the weight to be accorded to the doctors' opinions.

has prevented him from gaining employment. If Claimant is not a surgical candidate, the future course of treatment would involve medication and continued home physical therapy. (CX 11 at 7-11)

Dr. Fox also recommended a repeat MRI to be able to evaluate fully Claimant's chronic back syndrome. Dr. Kleiman is Claimant's primary physician and he would defer to Dr. Kleiman with reference to any impairment rating. According to Dr. Fox, "Spinal cord stimulation may be another option" based upon Claimant's "psychological profile." Claimant is not guilty of symptom magnification, according to Dr. Fox. (CX 11 at 22) As Claimant has been experiencing chronic pain since July 20, 1995, Dr. Fox acknowledged that "that's a long time to be in pain" and he opined that "psychological overlay is, at the risk of using a better terminology, a pretty normal aspect of this" and that is one of the factors that must be taken into consideration in determining whether Claimant is a proper candidate for a spinal cord stimulator. (CX 11 at 23-24)

The parties deposed Dr. Matthew Deutscher on November 16, 1999 (CX 13) and the doctor, a specialist in physical medicine and rehabilitation or physiatry, testified that he first examined Claimant on September 29, 1998 upon referral from Dr. Kleiman, that he enrolled and treated Claimant in the pain management program "because he was having pain," that he also prescribed use of "a brace at one point for his knee," as well as use of "a corset for his back pain," that he "recommended that (Claimant) see Dr. Fox "...for possible injections," that he prescribed "some medication to try and help him with his pain" and that he referred Claimant to Dr. Chris Brown for further evaluation. According to Dr. Deutscher, Claimant's use of the back corset and a cane helped his condition and the doctor "like(d) to think he improved functionally, but (he did not) know." Dr. Deutscher opined that Claimant reached maximum medical improvement on February 2, 1999 because (1) "he had completed his work hardening program," (2) "he told (the doctor) that nothing helped him," (3) that "he was already set up to go for vocational counseling" and (4) "(t)here was nothing further (the doctor) could do for him then." As of April 13, 1999, Dr. Deutscher opined that Claimant's injury of July 20, 1995 had resulted in a thirteen (13%) percent impairment, according to the 1993 Florida Impairment Rating Guide. The doctor next saw Claimant on April 19, 1999 and October 21, 1999. (CX 13 at 3-9)

Dr. Fox had advised Dr. Deutscher that Claimant had "some instability of the spine" and, as Dr. Fox "wasn't sure why Mr. Chupina continued to have pain," Dr. Deutscher "ordered an MRI of the spine," the doctor remarking that it was medically appropriate that he see Dr. Brown, who is a spinal surgeon, because of the "instability of the spine" and that Claimant "need(ed) to see a spinal surgeon to get their opinion about what should be done about it." According to the doctor, no one contacted him from the

Carrier or the vocational rehabilitation company to inquire as to the nature of Claimant's work restrictions and, assuming that Claimant does not have any surgical intervention, he would still experience flareup of back pain and "he may need some more therapy." As of that last visit of October 21, 1999, "the only thing (the doctor) could offer him was referring him to an orthotist to get some pads put on his knee brace." (CX 13 at 9-10)

Dr. Deutscher further testified that he had referred Claimant for an examination by a neurologist because "(h)e was having problems with a diabetic neuropathy, and (he) wanted to have that properly addressed." However, as of November 16, 1999, the Carrier had not authorized that referral. Dr. Deutscher testified further that Claimant's underlying diabetic condition "possibly" could have been aggravated or exacerbated by the pain syndrome and the "stress from the pain," especially as "(y)our blood sugar can get a little out of control, which could exacerbate it" and as "any nerve that's affected by neuropathy is always more prone to injury." Dr. Nicholas Suite, Jr., is the neurologist to whom he had referred Claimant for evaluation. (CX 13 at 10-12)

According to Dr. Deutscher, Claimant reached maximum medical improvement on February 2, 1999, although the doctor rated the extent of the permanent impairment on April 13, 1999. Claimant's functional capacity evaluation, performed on January 19, 1999, "demonstrated the ability to work within the sedentary work classification category" and, according to the tester, "Due to the fact that the patient is self-limiting, all functional activity is doubtful if his performance truly represents his maximal safe physical effort." Dr. Deutscher did not doubt the validity of the FCE and the doctor agreed that Claimant's safe physical limitations would be consistent with a sedentary type exertional level "provided he go back, start slowly and progress as tolerated." According to the doctor, Claimant's self-limiting behavior at the FCE "means (to the doctor) either the patient was not giving a maximal effect because they choose not to give an effort for various reasons or the patient did not give a maximal effort because they physically couldn't do it." As of April 19, 1999, Dr. Deutscher agreed with Dr. Fox that Claimant should be evaluated by Dr. Chris Brown and that, if Dr. Pasarin, also a spinal surgeon, had seen Claimant in April of 1998, Dr. Deutscher would have recommended that Claimant return to see Dr. Pasarin "if (Dr. Deutscher) felt he needed to be evaluated by a surgeon." (CX 13 at 12-18)

As early as December 14, 1998 Dr. Deutscher "gave (Claimant) a prescription to see a neurologist because of the diabetic neuropathy... a neuropathy that can cause a peripheral neuropathy, but it can cause other problems too." Dr. Deutscher prescribed bilateral knee braces for Claimant because of the leg instability. According to the doctor, Claimant's diabetic neuropathy... can affect every organ system," including his lower extremities, the

doctor remarking that claimant's problems with his lower extremities were due to a combination of his back pain and his diabetic neuropathy and that he was "hoping the neurologist could kind of weed this out for us." (CX 13 at 18-22)

Dr. Deutscher did not know if Claimant's underlying diabetic condition was worsened or aggravated by his July 20, 1995 injury and subsequent treatment and that is why the doctor referred Claimant to a neurologist for further evaluation and treatment. Claimant "could" have been unable to perform aspects of the FCE because of exhaustion and fatigue. (CX 13 at 22-24)

In his three-line comment appended to the November 18, 1999 letter from Attorney Sponsler to Dr. Guillermo A. Pasarin, the doctor has checked off the "No" block in response to whether or not "A spinal cord stimulator should be considered for this patient," and the doctor comments as follows (RX 6A) (Emphasis added):

> **But would need to see (him) back as much can happen or change in 1.5 yrs. before I can make a definite opinion.**

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of

physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v.**

Universal Maritime Serv. Corp., 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in

contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment

is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral leg problems, his low back, right elbow and right shoulder problems, and/or his July 20, 1995 injury, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

INJURY

The term "injury means accidental injury or death arising our of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidently injury. **See 33 U.S.C §902 (2) U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Steel Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2)2) of the Act. **Gardner v. Bth Iron Works Corporation**, 11 BRBS 376 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) Decision and Order on Remand); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989), **Mijangos V. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when Claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation

outside work, employer is liable for the entire disability if that subsequent injury is natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc., v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijanos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work related condition or the combination of work-and non-work related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA,** 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find conclude, that Claimant's July 20, 1995 serious shipyard injury resulted in a left knee condition diagnosed at the hospital as a laceration of the left knee (RX 1), that surgery was performed by an orthopedic surgeon as nerves and tendons were severed, that the injury was treated appropriately, that such injury has resulted in additional orthopedic problems as the natural and unavoidable consequences thereof because of his altered gait and these problems include a right leg pain syndrome, low back pain radiating down both legs, as well as right elbow and right shoulder pain, that the Employer has had timely notice of such problems, has authorized certain medical care and treatment and has paid certain compensation benefits to Claimant (CX 5) and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the

availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Section 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "PEPCO"). Pepco, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c) (21). Since Claimant suffered injuries to more thank one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1)-)20), with the awards running consecutively. Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268 (1980). In Brandt v. Avondale Shipyards, Inc., 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total and partial disability for certain periods of time to date and continuing. Moreover, the issue of permanency has not yet been considered by the Deputy Comaximum medical improvementssioner. (ALJ EX 2) **In this regard, see Seals v. Ingalls Shipbuilding,**

Division of Litton Systems, Inc., 8 BRBS 182 (1978).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a welder. The burden thus rests upon the Respondents to demonstrate the existence of suitable alternate employment in the area. If the Respondents do not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Respondents did not submit any probative or persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability, as further discussed below.

With reference to Claimant's transferrable skills and residual work capacity, Claimant's functional capacity evaluation is dated January 9, 1999 (RX 1) and this concludes that Claimant is limited to "sedentary work classification category. He also underwent testing at the Easter Seal Center for a work/vocational evaluation" in view of his disabilities, "insulin dependent diabetic with peripheral neuropathy in feet, chronic back pain", histrionic personality disorder; bilateral hearing loss."

In her June 21, 1999 four page report, Sue B. Kennie, M.A., C.V.E., Director, Vocational Services and Certified Vocational Evaluator concludes as s follows (RX 1):

"**RECOMMENDATION**

"Vocational Training.

"Rationale: To provide this client with an opportunity to be trained in a marketable skill so that he may resume competitive employment. Services needed: Assistance in enrolling in a training program and with job placement."

On the basis of the totality of this closed record, I completely agree with Ms. Sellers and Mr. Kennie that Claimant, as a highly motivated individual, cannot return to work at the present time, that he requires considerable vocational retraining and that his return to work has been substantially and significantly delayed by the Respondents' failure to authorize the medical treatment recommended by Dr. Fox and Dr. Deutscher on April 19, 1999, **i.e.**, a lumbosacral MRI and an examination by a spinal specialist. (CX 3, CX 4)

Claimant's injury has not become permanent. A permanent

disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled,

Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

It is obvious to the Administrative Law Judge that Claimant's recovery has been significantly delayed by the Respondents' failure to authorize that repeat MRI as well as a referral to a spine surgeon so that Claimant's multiple medical problems can be fully evaluated. The Respondents' delay herein has prevented the doctors from using the various treatment modalities recommended by Dr. Fox and Dr. Deutscher. Moreover, there has been no meaningful attempt made to determine whether or not Claimant truly needs a spinal cord stimulator and I have given no weight to Dr. Pasarin's cursory opinion rendered on November 23, 1999, and simply appended to a letter from Respondents' attorney, especially as the doctor candidly admits that he must re-examine Claimant **"as much can happen or change in 1.5 yrs."** Thus, the doctor's opinion is clearly outdated and I have given greater weight to the credible testimony of the Claimant as to the cumulative effect of his multiple medical problems and their impact on his ability to return to work. (RX 6A)

Furthermore, it is also obvious that Claimant, with an employment history solely dedicated to physically-demanding work, requires substantial vocational rehabilitation to retrain him for gainful employment so that he can return to the work force. The doctors are in agreement on that need and that retraining has not yet been provided.

Accordingly, I find and conclude that Claimant has not yet reached maximum medical improvement with reference to the multiple medical problems, resulting from his July 20, 1995 injury, that the

Respondents should authorize that appropriate medical care and treatment recommended by the doctors whose reports and opinions have been extensively summarized above and that the Respondents should also authorize the appropriate rehabilitation efforts so that Claimant can be retrained for other fields of employment.

With reference to Claimant's transferrable skills and his residual work capacity, an employer can establish a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 18 BRBS, 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipbuilding Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employer is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 102 (1985), **decision and order on reconsideration**, 17 BRBS 160 (1085).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimants injury are compared to the wages claimant was actually earning pre-injury are compared to the claimant has suffered a loss of wage-earning capacity. 33 U.S.C. §908 (c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook, supra.** Subsections 8(c) (21)and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. See **Walker v. Washington Metropolitan Area Transit Authority**, 793 F. 2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

The proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid

at the time his injury. **Richardson, supra**; **Cook, supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d (lst Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity,) it being common ground that it should be a fixed amount, not to vary from month to month to floows current discrepancies." **White, supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employees's average weekly wage a the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see e.g, Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir., 1984)), **rev'g and rem. on other grounds Tarner v. Trans State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White, supra**.

The law in this are is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employ therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. EMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee. **New Orleans (Gulfwide) Stevedores, Inc., v. Turner**, 661 D.2d 1031, 1043, (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case at bar, the Employer has offered the June 14, 1999 Labor Market Surveyor of Ms. Claire J. Lange, M.R.C., C.R.C., C.D.C.S., C.C.M, the Respondents' vocational counselor, wherein Ms. Lange reports that her opinions are based on her review of Claimant's file including his January 19, 1999 functional capacity

evaluation, three progress notes of Dr. Matthew Deutscher, handwritten notes from the Psychology Department at Health South, a physical therapy evaluation completed at Health South on October 29, 1998 and Dr. Kleiman's notes dated August 10, 1998. (RX 1) Ms. Lange attempted to interview Claimant (CX 7) but his attorney would not permit "a vocational evaluation, as of March 23, 1999, because "Mr. Chupina will be involved with retraining through the State of Florida." (CX 8)

According to Ms. Lange's April 14, 1999 labor market survey, "on 3/29 and 30, 1999, a number of employers were contacted in order to locate leads for the client, the following provided positive leads: Sandle Grove Apartment, C'est Papier, Playa Del Sol, Avis Rent A Car and Broward County".

According to Ms. Lange, "in a transferable skills assessment (life step) completed on March 29, 1999, the following jobs were recommended for the client based on the work history provided by the job application and physical capacities provided by Health South:

surveillance system monitor
security guard
customer complaint clerk
telephone solicitor
maintenance scheduler
ticker seller
toll collector
life delivery

Ms. Lange went to Sandle Grove Apartment and C'est Papier and after a long discussion, Jim at Sandle Grove Apartments said he did not want someone with walking restrictions. Lori at C'est Papier said she "would not allow the client to stand up every half an hour."

Ms. Lange went to the three other prospective employers on April 1, 1999 and she identified work as an unlicenced security guard at Playa Del Sol, an apartment complex, a "job mainly involving sitting, but the guard may stand as needed. Required walking does not exceed 1/8 mile. There is no lifting. They will train." The starting salary was $7.00 per hour for a forty (40) hour week.

Work as a gate attendant was available at Avis Rent A Car at the airport in Fort Lauderdale, and on April 1, 1999 Ms. Sproul "spoke with Cheryl, the gate attendant. Her gate is busy, but other gates are not. They are hiring for the other gates. It is possible to sit at least every 1.5 hours. Often it is slow on the other gates, and there is considerable opportunity for sitting. They are willing to train a welder," and the starting salary was $6.50 per hour for a forty (40) hour week. There is no lifting on

that job.

According to Ms. Lange, "at Broward County, (she) spoke with Marguerite Campbell regarding the Bridge Tending position. The individual sits most of the day, but may stand as need. Minor chores such as sweeping the area and dusting are required. They are willing to train a welder. He would be required to take a test." However, Ms. Lange was unable to indicate the nature or purpose of the test. (TR 56-97) The salary was $7.50 per hour for a forty (40) work week.

On April 5 and 12, 1999 Ms. Lange contacted other prospective employers but was unable to find suitable work within Claimant's restrictions but she did find suitable work as an unlicenced security guard at the Bay Colony in Fort Lauderdale earning $7.00 per hour for a thirty-two (32) hour work week. According to Ms. Lange's notes" "the roving guard would work from 2:30 to 10:30 p.m. He would check the 4 recreation halls hourly, lock the laundry rooms and turn off lights. He would be in and out of a car."

Word as an unlicenced security guard was available at the Kensington ??? in Pompano with a starting salary at $6.50 per hour for a forty (40) hour week. According to her notes, "the client would work at the back door logging in entrants. He may stand or sit as needed. They are willing to train. No lifting is required."

According to Ms. Lange, "Based on the wages associated with the five jobs which were located for Mr. Chupina, he could earn $265 per week in the local labor market. His restriction to sedentary work prevents a higher wage." She then contacted the Carrier and shortly thereafter closed her files. At the hearing Ms. Sproul was directed to obtain and file the starting salaries for those five jobs, after adjusting for post-injury inflating since July 20, 1995. However, those adjusted wages have not been filed.

Ms. Sproul testified at the hearing and, in the face of intense cross-examination by Claimant's counsel, modified most of her opinions in crucial points. While she detailed the records that she reviewed to prepare her transferrable skills analysis and her labor market survey and while she would not concede that her survey was premature, she admitted that she was retained by the Carrier solely to perform a vocational analysis and labor market survey and not to place Claimant in any particular job, that she was directed by the Carrier to interview Claimant if possible and to complete the necessary vocational intelligence testing (CX 6) and, as noted, Claimant's counsel would not permit an interview as Claimant had been accepted for vocational retraining by the state of Florida. (CX 7, CX 8) She was also directed to contact Claimant's treating physician(s) "to obtain the physicians' comments on the Claimant's current physical limitations and his

permanent work restrictions." However, Ms. Sproul did not contact any of the Claimant's physicians and was content, apparently, with reviewing Claimant's out-dated medical records. She contacted at least fifty (50) employers to be able to identify the five (5) jobs for Claimant, as directed by the Carrier. (CX 6)

Moreover, Ms. Sproul did not ask for any of the reports from Ms. Sellers or from the Easter Seal Centers, and she did not ask Claimant's counsel for any of those records. She was also not aware that the Carrier would not approve the work hardening program or the MRI or the neurological examination by Dr. Pasarin. As noted, these latter two recommendations were not approved by the Carrier until September 28, 1999.[3] (CX 2) Ms. Sproul would like to have performed the WAIS and MMPI tests as she finds these to be helpful in her transferrable skills analysis and her labor market survey. She did not look for jobs as a licensed security guard because these require passing a state test and she did not know Claimant's reading and test levels. Moreover, her report only refers to Claimant's left knee brace but he has used bilateral braces for quite some time. According to Ms. Sproul, the bilateral braces would not present a problem for prospective employment if he wore long pants, as opposed to the Bermuda shorts he wore to the hearing.[4] Claimant's back brace would present no problem, Ms. Sproul remarking that Claimant should minimize his disabilities and emphasize the strengths he would bring to a prospective employer.

Ms. Sproul candidly admitted that her labor market survey would be affected by the MRI and the neurological evaluation if the October 4, 1999 test produced positive findings[5] and if Dr. Pasarin or another doctor prescribed surgery. She did not obtain a job description for the jobs she has opined are suitable for Claimant and she did not know what sort of tests were required at Avis and at Broward County. She was also not aware of Claimant's IQ of 76.

As indicated above, the Respondents have offered a Labor Market Survey (RX 1) in an attempt to show the availability of work for Claimant. I cannot accept the results of that very superficial survey which apparently consisted of the counselor making a number of telephone calls to prospective employers. While the report refers to personal contacts with area employers, I simply cannot conclude, with any degree of certainty, which prospective employers were contacted by telephone and which job sites were personally visited to observe the working conditions to ascertain whether that

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[3] Again I note that these delays have significantly delayed Claimant's recovery herein.

[4] Claimant appeared at the hearing wearing bilateral braces.

[5] Claimant's August 13, 1997 lubmosacral MRI did show a herniated disc at L5-S1, as well as at the T11-12 levels. (RX 9)

work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that Respondents must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1987). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized Labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (RX 1) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific job duties of the five (5) alleged jobs identified by the Respondents, and whether such work is within the doctor's physical restrictions. (RX 1) Thus, this Administrative Law Judge has absolutely no idea as to what are the duties of those jobs, at the firms identified by the Respondents' vocational counsellor, especially as Claimant currently is limited to sedentary work only and none of the jobs identified are limited to sedentary work.

In view of the foregoing, I cannot accept the results of the Labor Market Survey because, without the required information about each job, I simply am unable to determine whether or not any of those job constitutes, as a matter of fact or law, suitable alternative employment or realistic job opportunities. In this regard, see **Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); Horton v. General Dynamics Corp., 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Medical Expenses

An employer found liable for the payment of compensation is, pursuant to Section 9(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward v. Lothrop, Inc.**, 16 BRBS 300 (1984)

Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1984); **Dean v. Marine Terminals Corp.,** 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Title & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F. 2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S. Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1988); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.,** 15 BRBS 299 (1983); **Beynum Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employers expense. **Atlantic v. Gulf Stevedores, Inc., v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAP Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employers refusal to authorized needed care, including surgical costs and the physicians's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Tod Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause showing in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. § 702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report, **Roger's Terminal, supra**.

On the basis of the totality of the record, I find and conclude

that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the employer of his work-related injury on the same day and requested appropriate medical care and treatment. However, the Employer and Carrier did not accept all aspects of the claim and did not authorize certain medial care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interest of justice as the Employer refused to accept the claim.

As the Respondents have recently approved the MRI and neurosurgical examination by Dr. Pasarin and as "the adjuster is looking into authorizing an additional internist to monitor (Claimant's) diabetes and hypertension," those medical expenses should be paid, as well as any unpaid medical expenses relating to the work-related injuries involved herein, as specifically discussed above, subject to the provision of Section 7 of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (19898); **Perry v. Carolina Shipbuilding**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 2229 (1985). The Board concluded that inflationary trends in out economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant while, and held that ". . . the fixed six percent rate should be replaced by U.S.C. § 1961 (1982). The rate is periodically changed to reflect the yield on United States Treasury Bills . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270)1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporate by reference this stature and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. N.B Use CX 5 to show what comp was paid.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14 (e), as the Respondents have accepted the claim, provided certain medical care and treatment and voluntarily paid certain compensation benefits to the Claimant and timely controverted his entitlement additional benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Oline Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and Carrier ("Respondent's) Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after May 8, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of this decision and Respondents' counsel shall have ten (10) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer and its Carrier ("Respondents") shall pay to the Claimant compensation for his temporary total disability from January 7, 1999, the date of his layoff, through the present and continuing, based upon an average weekly wage of $414.05, such compensation to be computed in accordance with Section 8(b) of the Act.[6]

2. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his July 20, 1995 injury on and after January 7, 1999.

3. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982),

[6] The record is unclear if benefits are being sought for the time period prior to January 7, 1999. If such benefits are sought, Claimant may do so by a timely filed Motion For Reconsideration.

computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including payment of those medical bills specifically discussed and approved herein, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondent's counsel who shall then have ten (10) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on May 9, 1999.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl